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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Dialing Parity/Number Administration/ Access to Rights-of-Way	)	

REPLY COMMENTS
of
SPRINT CORPORATION

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Summary

If competition in the local and intraLATA toll markets is to develop, the Commission must establish national standards regarding dialing parity, number administration and access to poles, ducts, conduits, rights-of-way and easements. Leaving these matters to individual carrier negotiations, as recommended by the BOCs, is costly, inefficient, and time-consuming, and does not offer adequate assurances that incumbent LECs will provide access to these services and facilities to competitive LECs on nondiscriminatory rates, terms and conditions. ILECs and CLECs are not in equivalent bargaining positions, and it is unrealistic to assume that competition can be achieved by having new entrants bargain with incumbent local carriers to obtain the concessions necessary for them to provide comparable service. There is simply no incentive for the incumbent to make such concessions and thereby lessen its present market power.

Under these circumstances, it is essential that the Commission promulgate national standards for nondiscriminatory access. These minimum national standards should include the following:

- the 2-PIC methodology should be implemented for intraLATA toll presubscription;
- dialing delay should be based upon the time the ILEC has control of the call, and should be the same for all calls, whether they terminate to the incumbent's own network or to the network of a competitor;
- nondiscriminatory access to operator services, directory assistance and directory listings should be made available pursuant to tariff;

- dialing parity involves seamless interconnectivity for all customers -- the ability of all customers to complete calls without dialing extra digits, paying additional fees, or experiencing unreasonable dialing delays or other disadvantages. The mere avoidance of an access code does not constitute dialing parity;
- costs of implementing dialing parity should be recovered from all service providers which enjoy dialing parity. Any dialing parity charge should recover only the ILEC's total service long run incremental costs (TSLRIC) of providing dialing parity;
- numbering resources should be administered by a neutral entity, and NPA overlay plans should be avoided;
- nondiscriminatory access (through publicly available contracts) to LEC poles, ducts, conduits, and rights-of-way should include all pathways or easements owned or controlled by LECs; however, access to LEC facilities such as buildings are subject to collocation, not right-of-way, requirements. Right-of-way access requirements under the Act apply to both public and private easements; any entity which denies access to its rights-of-way bears the burden of proving that such denial is reasonable and justified. The LEC or other regulated entity should be allowed to reserve spare capacity on its poles, ducts, conduits and rights-of-way to accommodate its reasonable needs one year into the future.

These national standards will help to establish the groundwork for competitive local and intraLATA toll markets by ensuring nondiscriminatory access to key resources.

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REPLY COMMENTS

Sprint Corporation, on behalf of Sprint Communications Company, L.P. and the Sprint local telephone companies, hereby respectfully submits its reply to comments on dialing parity, number administration, and access to rights-of-way, filed May 20, 1996 in the above-captioned docket.[1]

I. INTRODUCTION.

In its initial comments, Sprint explained that if local competition is to become a reality, there must be seamless interconnectivity -- the ability of an end user, no matter what the identity of his local service provider, to receive calls originating on another carrier's network, or place calls that terminate on another carrier's network, as if only a single network were involved. This type of dialing parity requires meaningful 1+

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[1] Sprint is also attaching its revised proposed rules to implement proposals set forth in its Phase I and Phase II filings in this proceeding.

presubscription opportunities; nondiscriminatory access to operator services, directory assistance and directory listings; and equivalent dialing times for all carriers. Competition also requires that public numbering resources be administered by a neutral entity, and that competitors have access to poles, ducts, conduits and rights-of-way on the same terms and conditions as are available to the incumbent LEC ("ILEC") or its affiliates. Sprint further explained that uniform nationwide standards governing access to these services and facilities are necessary to ensure that the 1996 Act's requirements regarding dialing parity, number administration, and access to rights-of-way are fulfilled in a timely, pro-competitive, and nondiscriminatory manner.

While commenting parties all agree that the 1996 Act does require nondiscriminatory access and neutral numbering resource administration, there is a divergence of views as to whether implementation of the Act should be actively managed by the Commission or left to individual carrier negotiations and state oversight. As shown below, Sprint continues to believe that there is a very real need for active Commission participation in the implementation of the 1996 Act and for nationwide uniform standards relating to dialing parity, number administration, and access to rights-of-way. This can be accomplished while at the same time balancing the need to adopt rules that are sufficiently

II. DIALING PARITY.

Although the BOCs acknowledge the importance of dialing parity, it is clear from their comments that their idea of what constitutes dialing parity is significantly different in many respects from that envisioned and considered necessary by most competitive LECs ("CLECs") and IXCs. In general, they urge that issues relating to dialing parity mechanisms and implementation (dialing delay, presubscription, and access to operator services, directory assistance, and directory listings) be left to the states and to carrier negotiations, rather than to federal regulation and oversight.[2] In addition, they assert that nondiscriminatory access does not mean the same access as the incumbent LEC itself obtains,[3] and that the costs associated with implementation of dialing parity should be recovered from "cost causers," *i.e.*, the CLECs and the IXCs.[4] As discussed below, the BOCs' interpretation of the dialing parity requirements of the 1996 Act is unduly narrow, and adoption of their recommendations

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[2] *See, e.g.*, Bell Atlantic, p. 2; BellSouth, p. 9; Pacific, p. 2; USTA, p. 2. Regarding dialing delay and presubscription, *see, e.g.*, Ameritech, pp. 13-14; Bell Atlantic, p. 2 and 6; Nynex, p. 9 (dialing delays of up to 5 seconds); Pacific, p. 2; US West, p. 7. Regarding access to operator services, directory assistance and directory listings, *see, e.g.*, BellSouth, p. 12; Nynex, p. 6; SBC, p. 6.

[3] *See, e.g.*, Ameritech, p. 12; Bell Atlantic, p. 6; Pacific, p. 8.

[4] *See, e.g.*, Ameritech, p. 10; Bell Atlantic, p. 5; Nynex, p. 10; Pacific, p. 16; SBC, p. 8 (what the market will bear).

here will hinder, not foster, the development of competition in the local and intraLATA toll markets.

A. National dialing delay and presubscription standards

Several BOCs assert that national standards regarding dialing delay and presubscription arrangements are not necessary. Sprint disagrees. The Commission should adopt minimum nationwide standards in both of these areas; if any state wishes to impose more stringent requirements, based upon local considerations, it should be allowed to do so. Nationwide standards will minimize customer confusion, avoid unnecessary duplication by different states, and facilitate entry by competitors who would be assured that certain minimum conditions necessary for competition to develop have been met.

Individual carrier negotiations, by contrast, are cumbersome and are no guarantee of nondiscriminatory rates, terms and conditions. ILECs and CLECs are not in equivalent bargaining positions, and it is to be expected that ILEC-CLEC negotiations will reflect this imbalance. It is unrealistic to assume that competition can be achieved by having new entrants bargain with the incumbent local carrier to obtain the concessions necessary for them to provide comparable service. There is simply no incentive for the incumbent to make such concessions and thereby lessen its present market power. As the Department of Justice has stated, "[t]here is no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent

clear legal requirements that they do so."[5] Moreover, carrier negotiations are far more resource intensive than obtaining service under tariff. Engaging in negotiations with 1400 incumbent LECs will place a tremendous and disproportionate burden on CLECs and is likely to hinder or at least increase the cost of competitive entry. Under these circumstances, it is essential that the Commission promulgate national standards for nondiscriminatory access. Individual carrier negotiations -- without the guidance afforded by such national standards -- will not be sufficient to bring about competition.

Although parties disagree as to whether the Commission should adopt a national presubscription standard, there is widespread support among IXCs and LECs for the 2-PIC presubscription standard for intraLATA toll.[6] The 2-PIC capability is well understood, readily available, and has been the choice of most states that have adopted a presubscription methodology.[7] Few parties would require ILECs to reballot end users once intraLATA toll becomes available (unless interLATA equal access is made available at the same time),[8] to implement the as-yet undevel-

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[5] Comments filed May 16, 1996, in phase I of this proceeding, pp. 9-10.

[6] *See, e.g.*, Sprint, p. 5; Ameritech, p. 14; Bell Atlantic, p. 3; BellSouth, p. 10; Nynex, p. 3; Pacific, p. 9; SBC, p. 3; US West, p. 5; AT&T, p. 3; MCI, p. 2; TRA, p. 3.

[7] *See* Bell Atlantic, p. 4, n. 5 (citing the states which have adopted the full 2-PIC methodology).

[8] AT&T appears to suggest (pp. iii-iv) that the Commission should mandate separate presubscription for interstate, intraLATA calls

Footnote continued on next page

oped smart-PIC technology, or to offer a separate international PIC. Because there are no apparent technological or practical impediments, and because dialing parity and competition are best achieved through presubscription, the Commission should require rapid implementation of the 2-PIC standard -- by the RBOCs within 6 months of adoption of rules, and by independent telephone companies within 12 months of adoption of rules.

Sprint also recommended (pp. 10-11) that dialing delay be measured from the time the caller completes dialing a call until the call is delivered by the ILEC to the CLEC, and that the same dialing delay standard apply to all calls, whether they terminate to the incumbent's own network or to the network of a competitor.

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on the one hand, and intrastate, intraLATA calls on the other. Separate presubscription along these lines is likely to be costly (new switch software may be required to distinguish interstate and intrastate intraLATA calls) and confusing to customers. Therefore, the Commission should allow all intraLATA toll presubscription to be done at the same time.

Sprint continues to believe that reballoting customers for intraLATA toll after interLATA equal access has been available could be confusing and costly, and therefore should not be required. Nonetheless, Sprint also is concerned about Pacific's proposal (p. 11) to make the dial-tone provider the default carrier "for both existing and new customers who do not actively choose an intraLATA toll provider." Sprint agrees that existing customers who are currently obtaining intraLATA toll service from the dial tone provider, and do not indicate a desire to change carriers, should remain with that intraLATA toll provider. However, it is not at all clear that Pacific's proposal to default new customers who do not choose an intraLATA toll provider to the dial tone provider is reasonable. An argument can be made that the interexchange carrier is a more logical default carrier, since the end user would then have one toll service provider and one toll bill.

This standard holds the ILEC responsible only for dialing delays within its control, and protects against discrimination in the processing of calls. This standard also avoids the problem of identifying a specific (*i.e.*, X seconds) dialing delay standard -- a significant benefit since the absence to date of a mandated national local number portability architecture makes it difficult to arrive at a reasonable dialing delay figure. Various parties urge that the Commission leave the issue of dialing parity requirements to the states. However, holding a LEC responsible only for dialing delays within its control is a principle which is unaffected by local conditions; thus, it is only logical to make this a national requirement. In addition, national standards should be adopted in order to ensure that local service providers meet minimum requirements nationwide, and to reduce the ILECs' ability to discriminate against their competitors in terms of dialing delays. The standards recommended by Sprint will satisfy these goals and should therefore be adopted.

B. National standards for access to operator services, directory assistance and directory listings

Sprint and various other parties interpret the nondiscrimination requirement of the 1996 Act as requiring that all CLEC customers have access to operator services, DA and directory listings on the same terms and conditions as apply to customers

of the ILEC.[9] However, several BOCs recommend that access to these services be subject to carrier negotiations rather than Commission mandate.[10] Sprint is concerned that leaving access to these services to carrier negotiations will result in unreasonable delays and discriminatory terms and conditions as between the ILEC and CLEC, as well as between CLECs. As noted above, CLECs may be forced to accept discriminatory or otherwise unfavorable terms, and individual carrier negotiations are costly and time-consuming. Therefore, a Commission rule requiring nondiscriminatory access to operator services, DA and directory listings, pursuant to tariff, for all local service providers is warranted.

C. Nondiscriminatory access

Ameritech, Bell Atlantic, and Pacific assert that the nondiscriminatory access provisions of the 1996 Act do not require the LEC to provide to its competitors the same access to telephone numbers, operator services, directory assistance and directory listings that the LEC itself receives. For example, Ameritech asserts (p. 12) that the Act simply requires that access to these services be nondiscriminatory among carriers. Under Ameritech's logic, it would be allowed to provide access to these services which is perceptibly (to the end user) inferior to that

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[9] *See, e.g.*, Sprint, p. 9; AT&T, p. 10; MCI, p. 8; Ameritech, p. 9; Bell Atlantic, p. 8.

[10] *See, e.g.*, BellSouth, p. 12; Nynex, p. 6; Pacific, p. 14; SBC, p. 6; US West, p. 9; USTA, p. 6.

provided to themselves or to their affiliates, so long as equally inferior access was provided to all of the BOC's competitors. Indeed, Ameritech goes so far as to assert (p. 3) that dialing parity has been achieved so long as local calls between competing LECs can be dialed without the use of an access code.

It is difficult to envision how true local competition is to develop if ILECs are allowed to offer access to their competitors which is in any way inferior to that provided to themselves and their affiliates. Even if no access codes are required, CLECs are at an obvious disadvantage if their customers are made to suffer unreasonable delays or incur extra costs. Because Ameritech's interpretation of dialing parity would enable the ILEC to provide access which is clearly and unreasonably inferior to that provided to itself and its affiliates, Ameritech's interpretation should be rejected.

Bell Atlantic and Pacific espouse an "essentially the same" standard.[11] Their interpretation of nondiscriminatory access also is unacceptable. The "essentially the same" standard is so amorphous as to be unenforceable. Even if a customer perception factor is considered, Bell Atlantic's and Pacific's interpretation would still be unacceptable because it would require service quality measurements (*e.g.*, measuring customer perception to de-

[11] Pacific, p. 8; Bell Atlantic, p. 6 (an ILEC is only required to provide access which "will permit the other carrier to provide comparable services with no difference in quality perceptible to callers").

termine what kinds of dialing delay are noticeable or bothersome to different types of customers) which are difficult or impossible to implement. Furthermore, Bell Atlantic's and Pacific's standard would allow the incumbent LEC to discriminate against its competitors in ways not visible to the end user, *e.g.*, by allowing the ILEC to impose unreasonable ordering procedures or other terms and conditions on competitors who wish to obtain access to numbers and services controlled by the ILEC. Such an outcome can hardly be considered pro-competitive.

D. Cost recovery

As noted above, several BOCs recommend that the costs of implementing dialing parity be recovered from the "cost causers" (Ameritech, p. 10) and new intraLATA presubscribed carriers ("the only beneficiaries" of intraLATA presubscription (Bell Atlantic, p. 5) -- *i.e.*, CLECs and IXCs. This approach should be rejected. It is both anticompetitive and unfair for the BOCs to push the entire cost recovery burden onto their local and intraLATA toll competitors. CLECs initially will have a far smaller customer base than the ILECs, and placing the entire cost recovery burden on CLECs is likely to be so prohibitively expensive as to discourage competitive entry. The BOCs' cost recovery proposal would make it doubly hard for CLECs to compete since the BOCs' own local and intraLATA toll operations would enjoy a significant financial advantage if they do not have to contribute to the recovery of dialing implementation costs.

Furthermore, it is not the case that competitors are the only beneficiaries of opening up the local and intraLATA toll markets to competition. All customers -- of CLECs, of ILECs, and of intraLATA toll providers -- benefit from competition in the form of lower rates, greater service options, and improved service.[12] Since all customers benefit from competition, all customers should contribute to the recovery of costs associated with dialing parity implementation. A more reasonable, competitively neutral approach to dialing parity cost recovery is to spread those costs over all service providers which enjoy dialing parity.[13] This approach is also consistent with that taken for recovery of interexchange equal access cost recovery, in which all IXCs (including AT&T, which had always enjoyed premium access) contributed to the cost of implementing equal access.

In addition to specifying who must contribute to the recovery of dialing parity costs, the Commission must also provide guidance on what costs may properly be recovered. Absent such guidance, there is an incentive for ILECs to attempt to recover numerous costs not directly and uniquely associated with dialing

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[12] Moreover, the likely increase in marketing activity generally could well lead to increased sales of CLASS services and other optional features and functions by the ILEC, and competitive pressures will doubtless result in efficiency gains to and new, revenue producing, service offerings by the ILEC.

[13] *See, e.g.*, AT&T, p. 7 (an equal access recovery charge assessed on a minute of use basis); MCI, p. 2; GSA, p. 7 (costs should be recovered from all users who have access to a CLEC with dialing parity).

parity. SBC, for example, asserts (p. 8) that it "should be allowed the opportunity to recover all costs related to the provision of dialing parity, including directly assignable costs (end office software, STP augmentation, etc.) and shared costs (such as third party administration)...and that portion of their infrastructure investment (for example, AIN) which is necessary to provide dialing parity."[14] Any dialing parity charge should recover only the ILEC's total service long run incremental costs (TSLRIC) of implementing dialing parity. A TSLRIC cost recovery standard is appropriate because dialing parity is a capability which the ILEC must offer all competitors -- it cannot be unbundled and purchased by a CLEC as a separate network element.

III. NUMBERING ADMINISTRATION.

There is general agreement that the Commission's *NANP Order*[15] satisfies, at least in principle, the requirement of the 1996 Act that a neutral numbering administrator be appointed.[16] However, until numbering plan and central office code administration are turned over to the neutral entity, there is a very real

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[14] *See also*, Pacific (p. 16) stating that it expects "full and timely recovery of...[dialing parity implementation] costs [such as] hardware, software [and] consumer education costs."

[15] *Administration of the North American Numbering Plan*, CC Docket No. 92-237, *Report and Order* released July 13, 1995 (FCC 95-283).

[16] *See, e.g.*, Sprint, p. 12; ALTS, p. 8; AT&T, p. 11; MCI, p. 9; Ameritech, p. 8; Bell Atlantic, p. 9; BellSouth, p. 19; Nynex, p. 18; Pacific, p. 24; SBC, p. 9; US West, p. 1; USTA, p. 14.

threat of anticompetitive and discriminatory conduct by the current administrators, Bellcore and the LECs. Several parties note that certain LECs continue to propose implementation of geographic overlays as a means of addressing NPA exhaust, and that overlays discriminate against new entrants because, among other reasons, their customers must dial more digits than do customers of the incumbent LEC to place most local calls.[17] It is because of this problem that Sprint urged (p. 14) that the Commission require implementation of geographic splits rather than overlays.

MFS (p. 4) and Pagenet (p. 8) suggest that overlay plans can be made more acceptable if the Commission were to require 10-digit dialing for all calls within an overlay area. However, this requirement would inconvenience customers in the original NPA who currently enjoy 7-digit dialing. Competition should improve, not degrade end users' service. In this case, it would appear that the benefits associated with requiring all customers to dial the same number of digits are outweighed by the costs. Sprint continues to believe that, rather than trying to improve what is essentially an anticompetitive measure, the industry should simply avoid that measure altogether and instead adopt the geographic split approach.

[17] *See, e.g.*, Sprint, p. 14; MFS, p. 4; Cox, p. 7; Pagenet, p. 1.

IV. ACCESS TO RIGHTS-OF-WAY

There is a substantial difference in opinion as to the degree to which the Act requires local exchange carriers to provide access to their poles, ducts, conduits, and rights-of-way. On the one hand, certain CLECs interpret the Act very broadly, suggesting that they should be granted access to roofs and riser conduit of LEC buildings, telephone equipment rooms and wiring closets.[18] On the other hand, the BOCs' interpretation is so narrow as to be inimical to the development of a competitive local market. For example, they oppose national standards and instead urge that the rates, terms and conditions associated with access to these facilities be subject to carrier negotiations and state oversight;[19] they would deny access where they have exclusive arrangements with the property owner;[20] and they would set aside potentially large amounts of spare capacity for their own long-term future use.[21] As discussed below, neither extreme should be adopted.

The Act clearly requires LECs to provide access to poles, ducts, conduits and rights-of-way, and Sprint believes that

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[18] *See, e.g.*, Winstar Communications, p. 3; MFS, p. 9.

[19] *See, e.g.*, Ameritech, p. 33; Bell Atlantic, p. 13; BellSouth, p. 17; Nynex, p. 12; Pacific, p. 17; USTA, p. 9.

[20] *See, e.g.*, Ameritech, p. 38; Nynex, p. 12; Pacific, p. 23; SBC, p. 17; US West, p. 17.

[21] *See, e.g.*, SBC, p. 18; US West, p. 18.

rights-of-way can reasonably be interpreted to include all pathways or easements owned or controlled by LECs.[22] However, demands for access to LEC buildings and collocation facilities are excessive. Sections 251(b)(4) and 224 mandate nondiscriminatory access to facilities which it is not feasible to duplicate; they do not pertain to situations in which access is desired for collocation purposes. Collocation requirements and the rates, terms and conditions for collocation are being addressed in Phase I of this proceeding, and rules governing access to rights-of-way should not be confused with rules governing collocation.

Access to LEC rights-of-way should not be left to carrier-customer negotiations. While such negotiations may have been adequate in the past given the fairly limited number of parties requesting access to these facilities, the situation has changed with the passage of the Telecommunications Act of 1996. More and more, the parties requesting access will be competitors to the ILEC, which will have a natural incentive to discourage such access or to provide it under terms which minimize the competitive threat to the ILEC's own operations. There are situations in which access to the LEC right-of-way is the only feasible option -- where "[b]uilding duplicative pathways [is] physically infeasible, prohibitively expensive, environmentally damaging, or

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[22] *See* AT&T, p. 15; American Communications Services ("ACS"), p. 2 (rights-of-way include building risers and vaults); ALTS, p. 7.

disruptive to local communities" (AT&T, p. 13). In such cases, the ILEC and the would-be attacher are not in equivalent bargaining positions, and there is little likelihood, and certainly no guarantee, that the terms offered by the LEC will be reasonable, nondiscriminatory or otherwise supportive of competition. Indeed, various commenting parties report instances in which they were offered or forced to accept discriminatory or unfavorable rates and terms.[23] Moreover, as noted above, carrier negotiations are far more costly for the CLEC, and introduce elements of delay and uncertainty into the process, than is the case under a system of standardized access.

Reasonable and nondiscriminatory access to LEC rights-of-way is crucial to the development of competition, and the BOCs' recommendations here will significantly limit access to these facilities by competitors. Therefore, the Commission should adopt minimum national standards which provide basic protection against abuses in the provision of access to LEC rights-of-way. The states would then be free to set additional requirements -- perhaps those thought necessary to accommodate unique local circumstances or help resolve case-specific problems[24] -- so long as

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[23] *See, e.g.*, ACS, p. 5; Continental Cablevision, Inc., *et al.*, p. 3; Nextlink, p. 3.

[24] As Sprint noted in its initial comments (p. 16), there is no standard formula to determine whether there is sufficient

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these requirements do not contravene the federally established minimum standards.

Sprint believes that the Commission's rules governing access to rights-of-way should reflect the following:

1. LECs should provide access to their poles, ducts, conduits, and rights-of-way pursuant to publicly available contracts. Publicly filed contracts would offer some assurance that such access is being provided on nondiscriminatory rates, terms and conditions. Rates, at least for the next five years, should be the same for all users, including the ILEC itself.

LEC provision of access to poles, ducts, conduits and rights-of-way is not a matter of discretion. Section 251(b)(4) states unequivocally that each LEC has the duty

> to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with Section 224.

See also Section 224(f)(1). US West protests, however, that there must be a "major caveat" to this requirement "because...a controlling LEC cannot grant what it does not have" (p. 17, underscoring in original); that

> [s]ome private easements and virtually all public easements are restricted to a given carrier. If

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capacity on a pole, duct, conduit or right-of-way to allow interconnection; such a determination often must be made based upon case-specific facts.

> another carrier wants access to poles, conduits, or rights-of-way, the carrier must approach the grantor or licensor directly to obtain necessary authority to place its facilities.

At least as regards public easements, US West's concern is unfounded. The Telecommunications Act of 1996 imposes obligations to remove barriers to entry to local competition not only upon dominant carriers, but also upon the States and municipalities themselves. Section 253(a) requires that

> [n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Thus, an "exclusive" public easement granted in favor of a single LEC which "has the effect of prohibiting the ability" of competing LECs to provide equivalent service (and this would ordinarily be the case) is plainly violative of the terms of Section 253(a).[25] From the standpoint of local public policy, the use of

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[25] Section 253(c) carves out an exception to the general prohibition in 253(a) by stating that

> [n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, <u>for use of public rights-of-way on a nondiscriminatory basis</u>, if the compensation required is publicly disclosed by such government. (<u>underscoring added</u>).

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a right-of-way by an ILEC is no different than the use of that same right-of-way by its competitors. A decision by a state or municipality to allow access to rights-of-way to a dominant carrier alone, while denying the same access to competing carriers, is hardly consistent with the policy of opening markets to local competition or the object of Section 253: "REMOVAL OF BARRIERS TO ENTRY." Consequently, absent extraordinary circumstances, an exclusive public easement should be preempted under Section 253(d).[26]

As US West appears to recognize, private easements are not typically granted on an exclusive basis. This Commission, as well as State Commissions, should regard with skepticism any claim by an ILEC that its easement is restricted to its own use and barred to competitors. *See Salvaty v. Falcon Cable Television,* 165 Cal. App. 3d 798, 802-03 (1985), and cases there cited.

It is perhaps reasonable to assume that there is no protection for any rights-of-way granted by a State or local government on an "exclusive" (*i.e.*, discriminatory) basis under Section 253(c) because such discrimination is ordinarily prohibited by Section 253(a).

[26] As the D.C. Public Service Commission recognizes (p. 9), the certification procedures in Section 224(c)(1) would not apply where preemption was grounded upon the requirements of Section 253.

Moreover, any BOC which denies access to its poles, ducts, conduits, and rights-of-way -- regardless of whether or not such denial is based on "exclusivity" -- does not meet item (iii) of the Competitive Checklist in Section 271(c)(2) and thus cannot provide in-region interLATA services.

2. Any entity which denies access to its poles, ducts and conduits bears the burden of proving that such denial is reasonable and justified.[27] Some parties assert that such a requirement is unreasonable because it assumes that the utility "is in all cases wrongly denying access" (New England Electric System, p. 14). However, the 1996 Act imposes access obligations on LECs and other utilities. These obligations, together with the fact that the LEC or utility is the party in the best position to determine whether space is or is not available, logically require that the LEC be responsible for demonstrating that access is infeasible.

Any LEC which asserts that it has no spare capacity on existing poles, ducts, conduits and rights-of-way should either invest in additional capacity or rearrange current applications (*e.g.*, by moving pairs at a cross-connect) to make more efficient use of existing facilities. LECs are entitled to fair compensa-

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[27] *See, e.g.*, Sprint, p. 16; Ameritech, p. 36; ALTS, p. 7; MCI, p. 23; Time Warner, p. 14; AT&T, p. 17.

tion for deploying additional capacity or freeing up existing capacity.

3. Regulated entities should be prohibited from entering into future contracts containing exclusive access to poles, ducts, conduits, rights-of-way and easements.[28] Such a rule will prevent regulated entities from soliciting exclusive agreements as a means of avoiding their access obligations under Sections 251(b)(4) and 224.

4. The LEC or other regulated entity may reserve spare capacity on its poles, ducts, conduits and rights-of-way to reasonably accommodate its own future needs. The definition of spare capacity proposed by AT&T -- capacity in excess of what is currently needed by the utility to serve existing customers efficiently and what the utility has set aside to use in the next year (p. 16) -- is a fair compromise between those parties which assert that no future set asides should be allowed (*see, e.g.*, MCI, p. 23; MFS, p. 10) and those which would reserve capacity for long-term needs (*see, e.g.*, SBC (p. 18) and US West (p. 18), urging that LECs be allowed to reserve capacity based on planning windows of up to 5 years).[29] Sprint, which has local operations of its own, appre-

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[28] *See, e.g.*, Sprint, p. 18; Nynex, p. 12.

[29] But compare Section 224(f)(1) with Section 224(f)(2), which allows an electric utility, but not a telecommunications carrier, to withhold access on the grounds of insufficient capacity.